United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

1131

To Be Argued By:
RONALD GENE WOHL

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

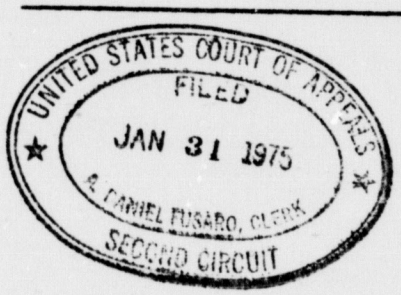
-against-

DANIEL REID and
THEODORE E. THOMAS, JR.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF AND APPENDIX FOR APPELLANT REID



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BRIEF FOR APPELLANT REID

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction, pursuant to Title 18, United States Code, Sections 2, 111, 922(i), 924(a) and (c), 1114, 2112, 2114, and 2312, for assaulting a Federal

officer, unlawful transportation of a stolen firearm, use of a firearm in the commission of a felony prosecutable in a court of the United States, robbing personalty belonging to the United States, assaulting a person having lawful charge of property of the United States, and, transportation of a stolen vehicle in interstate commerce, entered by United States District Judge William C. Conner, after a jury trial.

The defendant-appellant Reid was tried along with a co-defendant, appellant Theodore E. Thomas, Jr. .

Defendant-appellant Reid was sentenced to concurrent terms of 6 years incarceration on Count 1, 25 years on Count 2, 6 hears on Count 3, 3 years on Count 4, 2 years on Count 6 and 2 years on Count 7.

FACTS

This Federal prosecution stems from a State crime, the robbery of a liquor store in the Riverdale section of the Bronx on the 1st of August of 1974. During the commission of this non-Federal crime, at a time when the perpetrators were beating the owner of the liquor store with a wine bottle, and stabbing him with an ice pick, a Drug Enforcement Administration Special Agent, who had been getting a haircut at a barber shop next door to the liquor store (T-62), stepped into the liquor store wearing a barber's apron, with his service revolver in his right hand, his badge in his left hand, and saying, "Police, freeze" (T-66; H-318). The person beating the liquor store owner over the head with the wine bottle, alleged to have been

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Reference Key: H = Transcript of Hearings Pretrial;
T = Transcript of Trial.

defendant-appellant Reid, ceased the assault and turned to face the DEA Agent (T-66; H-319). The other person walked towards the Agent, seemingly confused, and did not stop when the Agent again admonished him to stop. The second man, alleged to be the defendant-appellant Thomas, then got the "drop" on the DEA Agent, forced the Agent to turn over his service revolver (H-319), ordered him to lie on the ground, and fired one or more shots, one of which broke the Agent's arm (T-67-69). The perpetrators then fled in a Buick get-away car (T-72).

At approximately 4 P.M., when the Agent entered the liquor store, it was a bright sunny summer's day (T-125; H-321,329). He was not wearing sun glasses (H-355) and he walked into a dimly-lit liquor store (T-91). He directed his attention to the man alleged to be Reid for a period of less than half a minute (H-320,357), and later looked at him for a few seconds from his position on the floor after

he had been instructed to lie on the floor. He again allegedly saw Reid in the street for merely a few more seconds. He described the defendants-appellants as dark complected negroes (T-107).

On August 4, 1974, defendants-appellants Reid and Thomas were arrested in Ohio by Ohio State Police, in possession of a stolen Pontiac car, the car having been stolen prior to the liquor store holdup by persons alleged to be Reid and Thomas (T-388). There was identification testimony during the trial respecting the taking of the automobile in which defendants-appellants were captured in Ohio, from a garage attendant, who, although he could not identify Reid during a line-up in Bronx County (T-343), was able to identify him at the trial in the court below (T-388). The automobile used in the get-away from the liquor store is different from the automobile in which the defendants-appellants were arrested in Ohio, the former having been recovered in New York City sometime subsequent to the liquor store holdup.

On August 5, 1974, the injured DEA Agent was advised by agents of the FBI that two men had been arrested in Ohio in possession of his service revolver (T-113; H-332-333, 352).

Prior to viewing defendants-appellants photos, the injured DEA Agent knew their names (T-117).

On August 7th or 8th, 1974, the injured DEA Agent was shown two photographs, taken in Ohio, of the two men, by agents of the FBI (T-95-96; H-332). Approximately three weeks before the trial in the court below, the injured DEA Agent was shown two photographs of the defendants-appellants by his supervisor at the Drug Enforcement Administration (T-105; H-333). The injured DEA Agent was not shown spreads of photographs on either of the prior two occasions (T-105; H-341), but merely the two photographs of the two defendants-appellants, taken in Ohio. At the trial,

the injured DEA Agent was the only witness to identify the defendant Reid in connection with the liquor store holdup and the ensuing assault upon a Federal officer.

Prior to the commencement of the trial (H-7-8), Reid's attorney requested that additional persons of the same general size, build and coloration, be seated at counsel table with Reid, so that, notwithstanding the two viewings of Reid's photograph by the injured DEA Agent prior to the trial, the confrontation during the trial would be more like a line-up than a show-up. The Marshals were unable to produce any such individuals (T-52). The Court was able to produce but one individual, almost twice the age of Reid (T-51), from the Veniremen at the Courthouse.

POINT I

THE POST ARREST PHOTOGRAPHIC SHOW-UPS WERE SO IMPERMISSIBLY SUGGESTIVE AS TO GIVE RISE TO A SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION

The in-court identification of Reid by the injured DEA Agent took place after the Agent had been twice shown Reid's photograph, taken in Ohio, after his arrest there in possession of the Agent's service revolver, and at a time when the Agent was aware of the Ohio arrest and the fact that defendants-appellants were in possession of his service revolver at the time of their arrest. The photographs of only the defendants-appellants were shown to the injured DEA Agent two to three days after he was notified of their arrest in Ohio in possession of his service revolver the day before. No photographic spreads were shown at all. He was merely shown two Polaroid photographs, one of Reid and the other of Thomas. He looked at these photo-

graphs, admittedly, for a period approximately equal to the time he had seen the perpetrator he identified as Reid in the dimly-lit liquor store. Part of the period of time that he looked at the perpetrator identified as Reid in the liquor store, he was lying on his stomach on the floor with his arm fractured by a bullet from his service revolver. The Agent was again shown these two photographs approximately two weeks prior to the trial, again without the insulating effect of a photographic spread and again, it is submitted, he was not limited in the amount of time that he might look at the photographs. He indicated that he looked at the photographs on this second occasion for just several seconds. However, it is respectfully submitted, the combination of these two photographic "show-ups", when viewed in the light of his original exposure to the perpetrators,

that is, for a brief period of time (less than one minute), in a dimly-lit liquor store after coming in from the bright, sunny outdoors, at a time when the liquor store owner was being beaten and stabbed and while he was taking out his service revolver and badge, and then the fast moving events where he was relieved of his service revolver and shot with it, the trauma of being shot, as well as the escape of the perpetrators, gives rise to the inescapable feeling that the in-court identification may well have been of the people in the photographs rather than the people in the liquor store.

The showing of the photographs of the defendants-appellants by themselves and without a photographic spread, was impermissibly suggestive. The showing of their photographs almost immediately subsequent to the report of their arrest in possession of the injured Agent's service revolver, was even more suggestive. The repetition of the showing of the photo-

graphs two weeks before trial, further compounded the suggestiveness and the likelihood that the injured DEA Agent, notwithstanding his training, was unable to get a very good "picture' of the perpetrators during the commission of the crime, and accordingly, that his real recollection was suggested by the photographic "show-ups". These photographic "show-ups" are the kind of circumstances which may have undermined the reliability of the Agent's otherwise admissible personal recollection.

In U.S. v. Cooper, 1973, 5 Cir., 472 F.2d. 64, the fact that the witness had viewed the bank robber for approximately five minutes, and that the bank robber had been to the drive-in window on two separate occasions within 25 minutes; and the fact that the witness was shown photographic spreads, one with 8 black and white photographs, and the other with 10 color photographs; and that thereafter the witness attended a line-up consisting of six men, four of whom fairly matched the bank robber; and the fact

On or about the 4th day of August, 1974

that there was a second identification witness, who was not shown any photographic spreads, but merely attended the line-up previously mentioned, went a long way toward assuring that there would not be a substantial likelihood of irreparable misidentification.

Likewise, in United States v. Ash, 1973, 413 U.S. 300, 93 S.Ct. 2568, the robbery lasted between three and four minutes. The FBI agent and the prosecutor showed five color photographs to four witnesses.

Both the Cooper and Ash cases are very different from the case at bar in every possible respect.

In the case of Neil v. Biggers, 1972, 409 U.S. 188, 93 S.Ct. 375, where the Court found an in-person show-up to be unnecessarily suggestive, since there was no substantial likelihood of misidentification, the Court did not exclude the in-court identification. However, there there was no photo-

graphic show-up and there had been no prior warning of the defendant's arrest with the service revolver belonging to the witness in the defendant's possession at the time of arrest. In that case, the Court said:

> "Suggestive confrontations are disapproved because they increase the likelihood of misidentification and unnecessary suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." 409 U.S. at 198

Surely, the suggestive photographic "show-ups" were totally unnecessary here. The defendants-appellants were in custody and there was no reason whatsoever for the photographic "show-ups" to take place. Moreover, the fact that there were two "show-ups", both unnecessary, further increased the chance of gratuitous misidentification.

In Neil v. Biggers, supra, the Court listed the following factors, in consideration of the circumstances to be viewed as a whole in evaluating the suggestiveness of the confrontation procedure and

the likelihood of misidentification: First, the witness' opportunity to view the criminal at the time of the crime. In the case at bar, that period is extremely short, certainly less than a minute -- a minute filled with numerous traumatic events taking place almost simultaneously. Second, the witness' degree of attention. In the case at bar, the witness focused his attention from one perpetrator to the other on numerous occasions. Third, the accuracy of prior descriptions of the perpetrators by the witness. In the case at bar, the witness' prior description was far from accurate, in that he referred to the perpetrators as "dark complected negroes", when, in fact, the defendants-appellants are light complected. Fourth, the level of certainty demonstrated by the witness at the confrontation; and, fifth, the length of time between the crime and the confrontation. While the length of time between the crime and the in-court identification was not terribly long, it was certainly

a tremendously long period compared with the length of time between the crime and the first suggestive "show-up", or indeed, the time between the second suggestive "show-up" and the trial.

In the case of Simmons v. United States, 1968, 390 U.S. 377, 88 S.Ct. 967, where there was a very strong reason for the FBI to determine whether they were on the right track because the perpetrators were at large, the Court permitted the procedure, saying, however:

> "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only

the picture of a single individual who generally resembles the person he saw. * * * The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." 390 U.S. at 383-384

POINT II

THE COURT BELOW ERRED IN NOT DISMISSING COUNT 2 OF THE SUPERSEDING INDICTMENT

A few days prior to the commencement of the trial, the Grand Jury handed up a superseding indictment, which was virtually identical with the prior indictment, except for the inclusion of a charge pursuant to Title 18, United States Code, Section 2114, which was Count 2 of the superseding indictment. This charged the defendant-appellant Reid with aiding and abetting defendant-appellant Thomas in robbing the DEA Agent of property of the United States, to wit: his revolver. Although motions were made at all stages of the proceedings relative to the dismissal of this charge, the Court permitted Count 2 to go to the jury, and subsequently denied all motions relative to Count 2 after the jury's verdict of Guilty on Count 2. The arguments

made throughout the trial relative to Count 2, were that this was a section of the law entitled, "Mail, Money or Other Property of the United States", and that it really pertained, in one way or another, to persons in the postal service or having to do with the mails, and, moreover, that this count effectively duplicated Count 1, which charged a violation of Title 18, United States Code, Section 111. Although all of the parties could find no case precisely in point at the time of the trial, there is a case "on all fours" with the case at bar. In United States v. Fernandez, 1974, 9 Cir., 497 F.2d. 730, a case like the case at bar, not involving the United States mails, the Court stated that unless there is connection between the mail system and the Federal property involved, Title 18, United States Code, Section 2114, is inapplicable.

The Ninth Circuit, focusing on the identical issue before this Court, stated in part:

> "* * * the issue presently before us: must there be a nexus between the property taken and the postal service?
>
> "Our reading of the statute leads us to conclude that the wording employed in amendment of its predecessor in 1935 is sufficiently ambiguous to raise the question of legislative history. Once legislative history is consulted a more precise focus is obtained. In 1935 the terminology 'money' and 'other property' was added to the statute which had previously contained only references to 'mail matter.' The congressional discussion is as illuminating as legislative history could possibly be:
>
> "The only purpose of the pending bill is to extend the protection of the present law to property of the United States in the custody of its postal officials, the same as it now extends that protection to mail matter in the custody of postal officials. Aside from that, it makes no change in the law. It just includes property of the United States in addition to mail matter which is protected; and let me say there are many

> custodians of postal stations who have a great amount of money in their custody but little mail; for instance, in those substations where money orders are sold. If a bandit attacks these employees seeking that money, there is no way to prosecute the bandit under the present law, but if he is merely after a postal card or a letter he can be prosecuted.
>
> 79 Cong. Rec. 8205 (1935) (emphasis added)." 497 F.2d. at 739-740

Even if the Court was not inclined to follow the ruling of the Ninth Circuit in the Fernandez case, defendant-appellant Reid's sentence on Count 2 ought to be remanded to the Court for re-sentencing. The Court indicated below at the time of sentencing that it felt constrained to consider Section 2114 as requiring a mandatory 25 year sentence. The Court indicated, however, that if it were permitted to sentence under Section 4208(a)(2) it would seriously consider such a sentence respecting the defendant-appellant Reid. (Sentencing Transcript pages 43-44).

CONCLUSION

IN VIEW OF THE FOREGOING, THE JUDGMENT OF CONVICTION ON COUNT 2 SHOULD BE REVERSED OR, IN THE ALTERNATIVE, REMANDED FOR A NEW SENTENCE; AND THE JUDGMENT OF CONVICTION REVERSED RESPECTING COUNTS 1, 3 AND 4 AND REMANDED TO THE COURT BELOW FOR A NEW TRIAL.

Respectfully submitted,

RONALD GENE WOHL

Attorney for Defendant-Appellant Reid

APPENDIX

SAS:gts

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA :

-v- : INDICTMENT

: 3 74 Cr.

DANIEL REID and
THEODORE E. THOMAS, JR., :

Defendants. :

- -x

COUNT ONE

The Grand Jury charges:

On or about the 1st day of August, 1974 in the Southern District of New York, DANIEL REID and THEODORE E. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly and by use of a deadly and dangerous weapon, to wit, a revolver, did forcibly assault, resist, oppose, impede, intimidate and interfere with a person designated in Section 1114 of Title 18, United States Code, to wit, Drug Enforcement Administration Special Agent Patrick Shea, while engaged in and on account of the performance of his official duties.

(Title 18, United States Code, Sections 111, 1114 and 2.)

COUNT TWO

The Grand Jury further charges:

On or about the 1st day of August, 1974, in the Southern District of New York, THEODORE E. THOMAS, JR., the defendant, aided and abetted by DANIEL REID, the defendant, unlawfully, wilfully and knowingly, did rob a person, to wit, Drug Enforcement Administration Agent Patrick Shea, having lawful charge, control and custody of property of the United States, to wit, a revolver, of such property, to wit, the said revolver, and in affecting or attempting to effect such robbery, did wound and put in jeopardy the life of the said Patrick Shea by use of a dangerous weapon.

(Title 18, United States Code, Section 2114 and 2.)

COUNT THREE

The Grand Jury further charges:

On or about the 1st day of August, 1974 in the Southern District of New York, THEODORE E. THOMAS, JR., the defendant, aided and abetted by DANIEL REID, the defendant, unlawfully, wilfully and knowingly did use a firearm to commit a felony for which he may be prosecuted in a court of the United States.

(Title 18, United States Code, Sections 924(c) and 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 1st day of August, 1974 in the Southern District of New York, DANIEL REID and THEODORE R. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly did rob another, to wit, Drug Enforcement Administration Agent Patrick Shea, of personal property belonging to the United States, to wit, a revolver.

(Title 18, United States Code, Section 2112 and 2.)

COUNT FIVE

The Grand Jury further charges;

On or about the 1st day of August, 1974 in the Southern District of New York, DANIEL REID and THEODORE R. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly did steal and knowingly convert to their own use a thing of value, to wit, a revolver of the United States and of a department or agency thereof, to wit, the Drug Enforcement Administration, said revolver having a value of more than $100.

(Title 18, United States Code, Sections 641 and 2.)

COUNT SIX

The Grand Jury further charges:

On or about the 4th day of August, 1974, DANIEL REID and THEODORE R. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly did transport in interstate commerce, from the Southern District of New York to Portsmouth, Ohio, a stolen firearm, to wit, a revolver, knowing and having reasonable cause to believe that the said firearm was stolen.

(Title 18, United States Code, Sections 922(i), 924(a) and 2.)

COUNT SEVEN

The Gran Jury further charges:

On or about the 4th day of August, 1974, DANIEL REID and THEODORE R. THOMAS, JR., the defendants, unlawfully, wilfully and knowingly did transport in interstate commerce from the Southern District of New York to Portsmouth, Ohio, a motor vehicle, to wit, a 1972 Pontiac, bearing New York license plate 751EKJ, knowing the same to have been stolen.

(Title 18, United States Code, Sections 2312 and 2.)

was directly involved and Mr. Reid was involved only as a co-participant.

MR. WOHL: Your Honor, I understand that, and I am certainly not disagreeing with you. I am pointing out, rather, that in the normal course of events on a 25-year sentence, as your Honor has pointed out, one-third is generally mandatory before parole, and while it makes virtually no difference insofar as the other eight-year sentences are concerned with regard to Mr. Thomas, it certainly does make a difference to Mr. Reid, and I was wondering, your Honor, even taking your Honor's point of view that you are bound to do nothing other than fix a mandatory sentence, I am wondering if your Honor could not make some indication on the sentence, if your Honor is so inclined, notwithstanding your feelings, that were you permitted otherwise you would consider 4208(a)(2) on the sentence on Count 2 with respect to Mr. Reid. Even though that would not be a dispositive provision, it might very well be persuasive if, as and when the Court of Appeals makes a determination relative to that case. I think it would be my feeling that we are fearful to make a notation to that effect, even if it is not a decretal paragraph to the judgment.

#10

THE COURT: Well, everything that I have said

here is on record, and if it turns out that a year from now or two years from now the Court of Appeals for the Second Circuit says that notwithstanding these previous decisions the Court in this circuit may sentence under 4208(a)(2) for a crime committed under Section 2114, you have material to go to the Parole Board with, and I have said here, I think more than I could possibly say in the sentence order per se, and I will say specifically that if I could at this moment sentence under 4208(a)(2), particularly with respect to Mr. Reid, under Count 2, I would very seriously consider it.

MR. WOHL: Thank you, your Honor.

THE COURT: I think we should put on the record, Mr. Schatten, that the original indictment in 74 Crim. 806, which was filed August 14, 1974, and which was superseded by the indictment under which the defendants were convicted, should be nolle prosequied.

MR. SCHATTEN: Yes, your Honor, we will consent to a nolle prosqui and also to a dismissal.

THE COURT: All right, so ordered.

MR. CURLEY: Your Honor, I have two or three comments, that the notice of appeal be filed on behalf of my client. I think, as the Court's intention with reference to Mr. Wohl's comments --

THE COURT: Well, we have the notice prepared,

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PAMELA BRANDES, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 23-45 Bell Boulevard, Bayside, New York. That on the 31st day of January, 1975, deponent served the within Brief and Appendix for Appellant Reid upon Honorable Paul Curran, attorney for United States of America in this action, at Southern District of New York, 40 Centre Street, New York, New York 10007, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me, this
31st day of January, 1975.

Ronald Wohl Pamela Brandes

RONALD WOHL
Notary Public State of New York
No 30-9718820
Qualified in Nassau County
Commission Expires March 30, 1976